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CITATIONS

565435—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 511

W. T. BECKHAM, CLERK, UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY, PETITIONER

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Kentucky (R. 68–74), is reported in 50 F. Supp. 313. The opinion of the Circuit Court of Appeals (R. 76–80) is reported in 137 F. (2d) 644.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 31, 1943 (R. 75–76). The petition for a writ of certiorari was filed in this

Court on November 27, 1943. Jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347 (a)).

QUESTION PRESENTED

Is an officer of the United States entitled to an order of attachment without executing the bond required by State statute?

RULE AND STATUTES INVOLVED

Rule 64 of the Federal Rules of Civil Procedure:

> At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or

equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

Section 198 of Carroll's Kentucky Civil Code:

> § 198. BOND TO BE EXECUTED BEFORE ISSUAL; FORM OF. The order of attachment shall not be issued by the clerk, until a bond has been executed in his office by one or more sufficient sureties of the plaintiff to the effect that the plaintiff pay to the defendant all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained, not exceeding double the amount of the plaintiff's claim.

Section 1001 of the Revised Statutes (28 U. S. C. 870):

> Whenever an appeal, or other process in law, admiralty, or equity, issues from or is brought up to the Supreme Court, or a district court, either by the United States or by direction of any department of the Government or any corporation all the stock of which is beneficially owned by the United States, either directly or indirectly, no bond, obligation, or security shall be required from the United States, or from any party acting under the direction aforesaid, either to prosecute said suit, or to answer in damages or costs. In case of an adverse decision, such costs as by law are

taxable against the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose directions the proceedings were instituted.

STATEMENT

On May 27, 1943, the Price Administrator of the Office of Price Administration, filed a complaint in the United States District Court for the Western District of Kentucky against Cummins Distilleries Corporation, its officers, directors and stockholders (1) to recover $6,799,101.57 as treble damages for selling whiskey in violation of the maximum price regulation issued under the Emergency Price Control Act and further asking (2) for a general order of attachment against the property of all the defendants therein. (R. 3–12.) The Clerk of court (W. T. Beckham, petitioner herein) refused to issue an order of attachment because the Administrator had not furnished the attachment bond and security required by Section 198 of the Civil Code of Kentucky. It is not disputed that the Administrator was entitled to the attachment if he was not required to give the bond required by the Kentucky statute.

Thereupon the Administrator instituted the present action against W. T. Beckham, as Clerk, asking that an order be entered requiring the Clerk to issue an order of attachment in the prin-

cipal action without the execution of an attachment bond by the Administrator.

The defendant Clerk filed a motion to dismiss the complaint (R. 19) and certain of the defendants in the principal action also intervened and joined the Clerk in asking such dismissal (R. 19–65).

The District Court sustained the petitioner's motion to dismiss; the Administrator declined to plead further; and his complaint was accordingly dismissed (R. 65–66). The Circuit Court of Appeals thereupon reversed the District Court (R. 75–76).

ARGUMENT

The decision of the Circuit Court of Appeals is correct; there is no conflict; and there is no occasion for further review.

All of the reported decisions including one by this Court are in accord with the decision below in holding that Section 1001 of the Revised Statutes (28 U. S. Code 870) relieves the United States and its agencies of the necessity of furnishing a bond as a condition to obtaining a writ of attachment or other ancillary process in the federal courts, although the state statutes expressly require the giving of a bond. *United States* v. *Bryant,* 111 U. S. 499; *United States* v. *Kinney,* 264 Fed. 542, 544 (E. D. Pa.); *United States* v. *Ottman,* 3 MacArthur (App. D. C.) 73; *United States* v. *Pacific Forwarding Co.,* 8 F.

Supp. 647 (W. D. Wash.); *The Eastern Shore,* 31 F. Supp. 964 (D. Md.).

That Section 1001 of the Revised Statutes (28 U. S. C. 870) exempts the United States, its officers and agencies from the requirement of furnishing a bond as a condition to obtaining attachments and other provisional remedies, is confirmed by the fact that in 1934 Congress amended the statute without making any change indicative of a disapproval of the prior construction placed upon the section. The 1934 amendment extended the benefits of the section to Government corporations, without making any other change in the section. In these circumstances the amendment of the section may be regarded as a Congressional approval of the prior construction placed upon it. Cf. *Johnson* v. *Manhattan Ry. Co.,* 289 U. S. 479, 500; *Heald* v. *District of Columbia,* 254 U. S. 20, 23.

The adoption of the Federal Rules of Civil Procedure did not work any change in the law. Rule 64 adopts the state law, subject to the express qualification: "any existing statute of the United States governs to the extent to which it is applicable." Section 1001 of the Revised Statutes is an existing statute which has not been repealed. Neither the Rules themselves nor the enabling Act in pursuance of which they were adopted repeal the Section.

Repeals by implication are not favored, especially where the rights of the sovereign are

affected, and where two statutory enactments can possibly stand together, both should be given effect. In *United States* v. *McIntosh,* 57 F. (2d) 573 (E. D. Va.), it was contended that Section 870 of Title 28 (Section 1001, R. S.) of the United States Code was repealed by implication by a later Act, now Section 382, Title 28. In rejecting this contention, the court said (p. 580):

> It seems clear, therefore, that section 870 of title 28 exempts the government from giving bond for the injunction in this case, unless it has been impliedly repealed by the later act of 1914, now section 382 of title 28, and the defendant contends for the implied repeal. But the act of 1914 does not expressly repeal the prior act, and it is a familiar rule of statutory construction that repeals by implication are not favored, and, where two statutory enactments can stand together, both should be given effect. Bearing in mind that the United States is sovereign, and that it has the undoubted right, subject only to self-imposed statutory restrictions, to resort to its own courts for relief in proper cases, it is, in my opinion, unreasonable to infer an intention on the part of Congress in the later general act of 1914 to impliedly repeal the earlier act, which seems to indicate a general policy not to burden the sovereign government with the obligation of giving bond in proceedings in its own courts. See *United States* v. *Herron,* 20

> Wall. 251, 22 L. Ed. 275; *Guarantee Title Co.* v. *Title Guaranty Co.*, 224 U. S. 152, 32 S. Ct. 457, 56 L. Ed. 706.

The Advisory Committee which prepared the rules has recognized the continued existence of Section 1001 of the Revised Statutes. See the notes of the Advisory Committee to Rules 54 (d), 72 and 73 (c). Furthermore, the Advisory Committee's notes to Rule 64 show that no change in the law was intended. In its notes to Rule 64 the Advisory Committee said:

> This rule adopts the existing federal law, except that it specifies the applicable state law to be that of the time when the remedy is sought. Under U. S. C., Title 28, Sec. 726 (Attachments as provided by state laws) the plaintiff was entitled to remedies by attachment or other process which were on June 1, 1872, provided by the applicable state law, and the district courts might, from time to time, by general rules, adopt such state laws as might be in force. This statute is superseded as are district court rules which are rendered unnecessary by the rule.

It is clear from the foregoing that the Rule was intended to effect but a single change, namely, to adopt by reference the state laws in force when the remedy is sought, rather than the state laws in effect on June 1, 1872. No other change was intended. In all other respects it was intended that the law should remain as it stood before the adoption of the Rule.

Nor can any implication be drawn from the provisions of Section 205 of the Emergency Price Control Act of 1942 that the Administrator should not be entitled to the exemption provided for by Section 1001 of the Revised Statutes. (See Pet. 15–16.) It is true that Section 205 (a) of the Act provides for the issuance of temporary restraining orders and preliminary injunctions at the suit of the Administrator without furnishing a bond, and that Section 205 (e) under which the principal action is being prosecuted does not provide for provisional remedies such as garnishment and attachment being made available without a bond. The reason that no provision is made in Section 205 (e) for provisional remedies being made available without bond is plain. That section does not deal with remedies but simply creates a liability. For the remedies available to enforce that liability, reference must be made to the general statutes and rules of court relating to civil practice. Section 205 (a), on the other hand, relates solely to a remedy, namely, the remedy by way of injunction and affirmative orders to enforce compliance. Since the section deals only with a remedy, the section properly prescribes the conditions upon which it is available. One of the conditions so prescribed is that it is to be available without the necessity of furnishing a bond.

Equally without significance is the fact that the action in which the attachment was sought was brought by the Administrator and not by the department of which he is the head. Cf. *Federal Housing Administration* v. *Burr*, 309 U. S. 242.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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DECEMBER 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943